1996

Paul Gardner, Paul Gardner dba NUF Corporation and NUF corporation, a Utah Corporation v. Kenneth Madsen, Marilyn Madsen, and Nauti Lady L. C., A limited Partnership : Brief of Appellant

Utah Court of Appeals

Lowell V. Summerhays; Attorney for Appellees.
Neil B. Crist; Attorney for Appellants.

IN THE UTAH COURT OF APPEALS

PAUL GARDNER, PAUL GARDNER dba NUF CORPORATION and NUF CORPORATION, a Utah Corporation,	)	
Plaintiffs/Appellees,	)	
vs.	)	
KENNETH MADSEN, MARILYN MADSEN, and NAUTI LADY L.C., A Limited Partnership,	)	Case No. 960683-CA
	)	Argument Priority 15
Defendants/Appellants.	)	

BRIEF OF APPELLANT

Appeal from the Judgment of the
Third District Court of
Salt Lake County, State of Utah
THE HONORABLE HOMER F. WILKINSON
DISTRICT COURT JUDGE

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BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from a final judgment of the Third District Court, Salt Lake County which awarded monetary damages and quieted title to a houseboat located at Hite Marina, Lake Powell, Utah. There have been no prior appeals.

Jurisdiction is based upon assignment from the Utah Supreme Court pursuant to § 78-2-2(4) and § 78-2a-3(j), Utah Code Annotated 1953.

ISSUES PRESENTED FOR APPEAL

WITH CITATION TO RECORD FOR PRESERVATION OF ISSUES FOR APPEAL

1. Did the trial court err in failing to find that Plaintiffs' claims against Defendants are barred by the doctrine of *res judicata*? (R 120-121; R 277 P 3-4)

2. Did the trial court err in finding that contrary to the clear and unambiguous language of the written contract, Plaintiff Paul Gardner rather than NUF, Inc. had a contractual claim against Defendants Madsen? (R 277 P 3)

3. Did the trial court err in failing to apply the proper law to the undisputed facts that the corporate Plaintiff had been dissolved prior to entry into the contract and that the contract or any attempt to assign rights under that contract was therefore void? (R 277, P 2)

4. Did the trial err in assessing damages based upon the full value of 30% of the total prime usage weeks when Plaintiffs had purchased only 10% ownership in the entity, failed to account for the value of non-peak weeks which had been effectively converted to peak "summer" weeks, and in determining that the subsequently formed Limited Liability Company was responsible for any damages to Plaintiff?
(R 896-898)

5. Did the trial court err in failing to disclose that his nephew was a principal in the Plaintiff corporation and a business partner of Plaintiff Paul Gardner, in failing to recuse himself and in failing to grant a new trial before an

impartial judge? (R 905, P 21)

6. Should Defendants be awarded their costs and attorney's fees incurred in the defense of the action at trial and on this appeal? (R 277, P 16-17)

STANDARD OF REVIEW

The following standards of review apply to the issues for review set forth herein:

a. The standard of review for the trial court's findings of fact is the "clearly erroneous" standard. Alta Indus. LTD vs. Hurst, 846 P.2nd 1282, 186 (Utah 1993).

b. The broadest scope of judicial review extends to questions of law in order to insure that the law is applied equally throughout the jurisdiction. State v. Pena, 869 P.2nd 936 (Utah 1994).

c. Whether the trial court abused its discretion in failing to disclose a close family relationship to a principal in the case and by denying Defendants' Motion for a New Trial on the basis of a judicial conflict of interest is reviewed by whether the conduct was beyond the limits of reasonableness. State v. Olsen, 860 P.2d 332, 334 (Utah 1993).

d. The standard of review on the award of attorney's fees at trial is abuse of discretion. Baldwin v. Burton, 850 P.2d 1188, 1198 (Utah 1993).

DETERMINATIVE STATUTES

Sections 16-10-51, 16-10-88.2 and 16-10-100 of the Code Annotated (Utah Business Corporation Act as effective 1990).

See Appendix A of Addendum.

Utah Code of Judicial Conduct: Terminology - (1) "Economic interest"; (2) "Third degree of relationship"; and Canon 1; Canon 2 A and B; and Canon 3 E(1)(c)(d)(i-iv) and F.
See Appendix B of Addendum.

STATEMENT OF THE CASE

1. Nature of the Case.

a. Breach of Contract: Where the purported contract was entered into by a dissolved corporation and where a principal of that dissolved corporation is attempting to enforce the terms of that contract personally and on behalf of the dissolved corporation.

b. Judicial Conduct: Where the trier of fact failed to disclose a family relationship with a principal of and business partner to Plaintiffs in the action.

c. *Res Judicata*: Where a previous court had granted summary judgment against Plaintiffs for the same complaint filed by the same principals with virtually the exact wording of the case subsequently litigated.

d. Damages: Where the damages awarded to Plaintiffs for breach of contract failed to account for the value of what was undisputedly available to Plaintiffs.

2. Course of Proceedings.

a. First case: Plaintiff NUF, Inc. filed suit against Defendants Madsen claiming breach of contract. Judge Frederick granted Defendants' Summary Judgment that there was no

cause of action as a result of the corporation's dissolution by the State.

b. Second case: Plaintiffs' filed the instant case adding Paul Gardner as named Plaintiff and with NUF, Inc. as a "D.B.A.". Judge Wilkinson denied Defendants' Motion to Dismiss for *res judicata* and their Motion for Summary Judgment, in which they alleged that the contract had been entered into by a corporation which had been dissolved, was therefore void, and which gave Plaintiffs' no standing before the court. Both rulings were without comment nor findings.

c. Post-trial: Defendants filed a Motion for a New Trial and Reassignment of Judge on the basis of the subsequently discovered family relationship between the trial judge and a party in interest in the case. That motion was denied by Judge Wilkinson and subsequently denied by presiding Judge Lewis.

3. Disposition in the Trial Court. A two day bench trial in which the court found that, contrary to the clear and unambiguous language of the contract, the contract was entered into by Plaintiff Paul Gardner and that all Defendants, including the subsequently formed Limited Liability Company were liable to Mr. Gardner for damages. The Court awarded compensatory damages and attorney's fees to Plaintiffs of approximately $78,000.00 and quieted title to 10% of the boat in Plaintiff Gardner personally.

4. Statement of Relevant Facts.

Plaintiff NUF, Inc. was incorporated in Utah on April 28,

1988, dissolved by the Corporations Division on May 1, 1990 and never reinstated. (Hereinafter this corporation shall be "NUF 1".) (R 161)

On June 15, 1990, less than 2 months after its dissolution, Plaintiff NUF 1, through Paul Gardner as President, purportedly entered into a contract with Defendants Kenneth and Marilyn Madsen (hereinafter "Mr. Madsen" and "Mrs. Madsen") for the purchase of a 10% interest in a houseboat known as "Nauti Lady" (hereinafter "houseboat" in order to differentiate from the Limited Liability Company of same name.) (P. Exh. 11) None of the parties to the contract was aware that NUF 1 had been dissolved. (T1 at 38 and T1 at 60) The undisputed consideration for this purchase was $10,000.00. (T1 at 196) Defendants claimed that the consideration also included the payment of a disproportionate share of the maintenance and upkeep expenses. (T1 at 239-240) Plaintiff characterized these payments as justification for being entitled to 3 times the proportionate amount of the prime (summer) usage weeks. (T1 at 42, 15-18) Defendants denied an "entitlement" to the extra summer weeks but did acknowledge that they had agreed to allow extra summer use on a space available basis. (T1 at 198)

There had been discussions between Madsens and Paul Gardner as President of NUF 1 before June 15, 1990, but only sparse evidence as to whether these discussions took place on, before or after May 1, 1990. (T1 at 125, 236 and 196, L4)

The evidence presented by Plaintiffs on nearly every

material issue of the case was diametrically opposed by Defendants and their evidence. The evidence on those issues were as follows:

a. Content of Contract:

(1) Plaintiffs introduced Exhibit No. 11 as their version of the contract. The only person privy to the contract on behalf of Plaintiffs was Paul Gardner who testified that there had been no alteration to the face or body of the contract since it had been executed. (T1 at 41, 2-5)

(2) Mr. Madsen testified that at the time that the contract was executed, he initialled minor changes to the contract, but those changes did not include the word "summer". (T1 at 195, 1-16) Mr. Madsen's copy of the contract, Defendants' Exhibit #2 did not contain the interlineation with the word "summer", but did contain the same initials for Mr. Madsen that appeared on Plaintiff's copy. (T2 at 41, 1-17) Mr. Madsen emphatically denied that the word "summer" was ever written into the contract in his presence or with his approval. (T2 at 44, 14-25) Finally, Mr. Madsen testified that in his business experience it was always his practice to initial all copies of the contract when changes had been made. (T2 at 45, 2-13)

(3) Defendant's expert witness, George Throckmorton, testified that Plaintiff's Exhibit 11 had been altered after changes made to the contract had been photocopied. (T2 at 38, 8-11) The original changes were written by the same pen and hand that had written the initials KM [Defendant Kenneth

Madsen] (T2 at 38, 13-23) He further stated that there was ..."a third pen that was used that wrote in the word "summer" and the slashing line that pointed between the words "weeks" and "each". (T2:38:24) He also noted that the third pen had not been used elsewhere in the document. (T2 at 39, 2-5)

(4) In his ruling, Judge Wilkinson found that 6 summer weeks, equivalent to 30% of the peak usage time was a reasonable interpretation of the contract in consideration for Plaintiffs' purchase of a 10% ownership. (R 277 at 5, 25)[1]

b. Parties to Contract:

(1) On their case in chief Plaintiffs provided no evidence that the contract was entered into by any person or entity other than NUF 1. On cross-examination Mr. Gardner admitted that he had filled in the blank with the buyers information and that no one else had told him to write in "NUF, Inc." (T1 at 112-113) When specifically asked about his intention at the time that he executed the contract, he stated that it was his intention to enter into the contract on behalf of "NUF, Inc.". (T1 at 113, 10-13) However, in his redirect testimony Paul Gardner raised for the first time the claim that he had personally purchased 10% of the houseboat. (T1 at 129, 12-13) Gardner did admit that he had stricken the original words

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[1]After 2 requests the appellate clerks at the Third District could not locate the original transcript of the judge's bench ruling. A copy of the first page of that ruling is included at page 277 of the record. As a convenience to the Court, Appellants have attached a copy of the entire ruling as appendix C to their brief. Page numbers correlate to those in that attachment.

"husband and wife" when he inserted the words "NUF, Inc" as buyer. (T1 at 112, 12-32)

(2) Mr. Madsen testified that the contract was drafted with NUF, Inc. (NUF 1) as the Buyer. (T1 at 236, 16) Mr. Madsen further testified that Mr. Gardner had told him that the ownership of the houseboat was to be placed in the name of the corporation to protect it from Mr. Gardner's wife, with whom he was experiencing some marital difficulties. (T1 at 236, 18-20) He emphatically denied that the contract had been made with Paul Gardner personally. (T1 at 236, 21-23)

(3) The wording of the contract itself is very clear and unambiguous. The parties to the contract are clearly Mr. and Mrs. Madsen and "NUF, Inc. a Utah Corporation". (P. Exh. 1, Page 1) In addition, it is clear from even the photocopy of the contract presented by Plaintiffs that Paul Gardner signed on behalf of the buyer as "NUF, Inc. by Paul Gardner, its president". (Plaintiff's Exhibit 11, Page 4)

(4) Judge Wilkinson ruled that the contract was actually between Mr. Gardner personally and Madsens.

c. Limited Liability Company:

(1) Plaintiffs provided no evidence regarding any contractual rights between them and Defendant Nauti Lady L.L.C.

(2) Defendants' evidence showed that, subsequent to the contract between them and NUF 1, they had sold shares to 2 other parties, subsequent to which a Limited Liability Company was formed for the purpose of managing the houseboat. (T2 at 6-7)

(3) The letter submitted by Plaintiffs as Exhibit No. 45 which Plaintiff Gardner claimed to be an infringement of his rights by the L.L.C. clearly states that it is written on behalf of Madsens as the party with whom Plaintiffs had their contract. (P. Exh. 45) The correspondence also reflects that Plaintiffs use of the boat was not suspended until after Plaintiffs filed the litigation. (Exh. 23, T1 at 81-82)[2] In his cross-examination, Mr. Gardner admitted that no one had taken any action to suspend his ongoing usage of the boat until after he filed suit against Madsens. (T1 at 40)

(4) In its ruling, the court found that the Limited Liability Company was jointly and severally liable for the damages to Plaintiffs for the loss of use after formation of the company. (R 896-898)

d. Damages:

(1) Mr. Gardner testified that he had only used the boat 9 times since entry into the contract. (T1 at 63, 18-19) Even with this testimony the court found that he had used the boat 6 times. (R 277 at P 15) Although he made vague claims to having been denied use of weeks, (T1 at 64-65) he provided no evidence as to the weeks that had been requested and denied, other than the week for which his use had been forfeited as a result of the violation of the houseboat rules. (T1 at 63, 22-24)

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[2]Mr. Gardner then states that he contacted Mr. Summerhays <u>after</u> receiving the letter. However, the letter was dated July 27, 1993. Mr. Summerhays filed the first complaint against Madsens on July 8, 1993. (See Civil # 930903925)

(2) Mr. Madsen testified on the basis of rental inquiries which he had made, flyers published by the Lake Powell concessionaire and his own knowledge of the comparison of houseboats available for rent on the lake that the average rental value during the peak summer months was $1,800.00. When he attempted to testify as to the value of off-peak weeks, that testimony was excluded by the trial judge. (T1 and 231) However, Defendants' Exhibit 3, which was admitted shows the going rates for off-season rentals for a 50 foot boat to be $1,199. (D. Exh. 3) He also testified that the agreement had been for Plaintiffs to utilize the boat on a space available basis, and that the requests made by Plaintiff had been met except when the boat was down for repairs and the week that was forfeited as a result of Gardner's repeated rule violations. (T1 at 198 and T1 at 201)

(3) In making its ruling, the court ignored the reality that it had, in fact, converted Plaintiff's off season weeks into prime weeks. In doing so, the court assessed the damages on the basis of $1,800.00 per week, totally ignoring the value of the off season weeks to which Plaintiff had been otherwise entitled under the contract. (Ruling P 15 L1-3) The court also based those damages on the assumption that Gardner had been denied each week that he did not use the boat. (Ruling P 15 at 15-18) It made no finding as to the number of weeks that had been requested and denied, nor the availability of the boat during the off-season.

e. Maintenance Assessment:

(1) Mr. Gardner testified for Plaintiffs that he had agreed to pay 20% of the maintenance expenses because "I'd be using the boat more than him [Mr. Madsen]" (T1 at 42, 14-18)

(2) Mr. Madsen testified that the document had been originally drafted with a 25% allocation of maintenance expenses to each buyer, but that it had been changed to 20% at the request of Mr. Gardner since there would be ultimately 5 users of the boat in the long run, and 20% would reflect an equal allocation between the 5. (T1 at 239) Mr. Madsen testified that the 25% was based upon the fact that the minority shareholders would split the maintenance costs since they had contributed less toward the purchase price (T1 at 240)

f. Operator Damage:

(1) Mr. Gardner testified that he "voluntarily agreed to pay" for the repair of the outdrives on the boat. (T1 at 45, 11-13) This was supposedly done as a gesture of "good faith" so that the boat would be functional for the following summer. (T1 at 45, 13-15) At trial Mr. Gardner claimed that these payments were "advances" on his 20% obligation for any maintenance fee obligations. (T1 at 38, 14-25) He claimed that major damage to the boat was to be paid from the maintenance fee into which all owners would contribute in proportion to their ownership. (T1 at 45, 16-20 and T1 at 146, 5-8)

(2) Mr. Madsen testified that the maintenance fee was to cover routine maintenance and not damage caused to the

boat by operator negligence. (T1 at 209, 23-25 and T1 at 210, 8-25) He stated that Mr. Gardner had caused the damage to the outdrives, and that at the time Gardner agreed to make the payment for those repairs since he had been at fault and felt obligated to do so under the contract. (T2 at 50, 4-19, T2 at 52, 4-25 and T2 at 55, 1-10)

(3) The relevant paragraph of the contract is No. 4, which as modified by the parties reads:

> BUYERS further agree to reimburse SELLERS for twenty-five (25%) (20%) [parties' initials] percent of any out of pocket expenses reasonably incurred to keep the property and equipment thereon in good working order or to repair any damages or equipment failures NOT INCURRED BY ANY ONE PARTY. (Refer to Boat Rules and Regulation).

The last six words of the sentence are clear, appear in all capital letters in the contract, and are followed by a reference to the Rules and Regulations for the boat.

g. Propeller repair:

(1) Mr. Gardner admitted that he repaired the propeller on at least one occasion but claims that he did not damage it. (T1 at 55-57)

(2) Mr. Madsen testified that several damaged props were discovered upon arrival at the lake during the weeks after Mr. Gardner had used the boat. (T1 at 210-212) Neither Mr. Madsen nor Mrs. Madsen could testify that they saw Mr. Gardner cause the damage, but both did testify that when the boat was last in their control it was in good repair but that after Gardner's use it had been damaged. (T1 at 201 and T2 at 23)

(3) The court made no ruling as to the damaged propellers but lumped these items into the normal maintenance category. (Ruling at 11-12)

In addition to five pages of the basic contract, the document included 4 attachments (the Rules and Regulations, checklists to be executed upon the commencement and termination of each usage, an inventory of the items included on the houseboat and miscellaneous cleaning instructions). (T2 at 17, 15-23) Mr. Gardner testified that he faithfully utilized the checklists when he arrived at the houseboat and when he left it. (T1 at 84, 7-21 and T2 at 88, 7-12) However, on cross-examination Mr. Gardner did not know the difference between the oil breather vent and the access for the oil dipstick on the main engines. (T2 at 81-82) In fact, he testified that it was impossible to check the oil in the engines because there was no dipstick in the breather vent. (T2 at 74)

Similarly, the court found Plaintiffs to be responsible for the damage to the refrigerator, the proper procedures for which were included in the checklist. (R at 12, 15-17)

In 1991 Madsens sold a second 10% share of the houseboat to a third party with a contract virtually identical for that used with Plaintiff NUF 1. The changes to that contract were consistent with those admittedly made by Kenneth Madsen in the contract with NUF 1. (T1 at 198, 19-25) The changes to this contract were confirmed by the buyer, Duane Shaw, both as to timing and extent and all changes were initialled by the parties.

(T2 at 12, 4-19)

In early June 1993 Defendants Madsen discovered conclusive evidence that Gardner had violated the rule regarding pets on the houseboat, in that Gardner had kept a dog on the boat during the first week in June 1993. (T2 at 58, 17-18) Gardner ultimately admitted having the dog on the boat, but denied knowing that it was an infraction of the rules. The Court did find that he had received those rules. (Ruling at 7, 5-22) The unrebutted testimony was that the infraction was considered serious because several of the users had experienced allergy problems from pet dander.

After discovering the evidence of the pet violation, Defendants Madsen notified Gardner that his disregard for the rules was intolerable and that he would forfeit his next week usage as a result of the most recent violation. (T2 at 58, 1-25 and P. Exh. 45) This is the only week that all parties agreed had been requested by Gardner and subsequently denied.

The NUF/Madsen contract did not specify any procedures for due process regarding violations. The contract did, however, provide for forfeiture due for rule violations. (Exh D-2, Rules 8, 10 and 13) There was no evidence at trial that anyone other than Plaintiffs (i.e. 10% of the ownership) objected to the sanctions imposed for the repeated violations by Gardner.

Gardner filed the first action against Defendants Madsen on or about July 8, 1993. That action was assigned Civil No. 930903925 and assigned to J. Dennis Frederick of the Third

District Court, Salt Lake County. (R at 120)

On August 26, 1993, Judge Frederick, granted summary judgment against Plaintiff NUF, Inc. on the grounds that NUF, Inc. had been dissolved by statute and was not a legal entity entitled to pursue the action. No appeal of this decision was ever filed by NUF 1. (R at 121, 141 and 146)

On August 12, 1993, Gardner caused to be filed with the Corporations Division a new entity known as NUF, Inc. (hereinafter referred to as "NUF 2"). (R 122 at para. 11) On or about October 19, 1993, through the same attorney Gardner and NUF 2 filed the present suit against Defendants Madsen but also named the Limited Liability Company as a Defendant. (R 121 at para. 15) There was no evidence that Gardner was not the real party in interest in both suits nor that the Limited Liability Company had done anything contrary to Plaintiffs' interests after the judgment was entered in the first case. This action was improperly filed in the Circuit Court but was ultimately transferred and assigned Civil No. 930906772, before Judge Homer J. Wilkinson. (hereinafter Instant Case.) (R 121 at para. 16)

With the exception of the heading, which included Paul Gardner personally as a Plaintiff, Nauti Lady, L.L.C. as a newly named Defendant and a new Count No. VI which related to a purported cause of action against the L.L.C. that transpired before August 26, 1993, the Complaint in case 2 was exactly the same as that which had been dismissed by Judge Frederick in Case No. 1. The purported cause of action arose from the same

contract, with all of the same signatures and changes. Even the grammatical and spelling errors were identical. (R at 121, para. 5 and R at 122-123)

On or about July 27, 1993, Defendants filed a Motion to Dismiss the second case on the grounds of *res judicata*. (R 13-14) Plaintiffs responded that NUF, Inc. was [now] a corporation in good standing and capable of filing and pursuing the action.[3] (R 31 at para. 1) Defendants' motion was denied without findings or comment by Judge Wilkinson on May 3, 1994. (R 66)

Defendants subsequently made a Motion for Summary Judgment on the same grounds set forth in the first case before Judge Fredericks, i.e. that NUF 1 was the only entity that had been a party to the Madsen contract, and that any rights which NUF 1 might have had were terminated by the corporate dissolution. (R120) Defendants specifically alleged that NUF 2 was a totally separate legal entity, had no interest in the June 15, 1990 contract, and had no cause of action against these Defendants. (R 120-121) The court declined to rule on the motion even after the presentation of the Plaintiff's case at trial. (T1 at 190, 6-25 and R at 277, P3 L25 - P4 L2)

At trial Defendants learned that Clayton H. Wilkinson was an

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[3]The significance of NUF 2 was made clear by Plaintiffs in their response to Defendants' Motion to Dismiss which was filed in the Circuit Court prior to the transfer of the case to District Court. Paragraph 1 from their statement of facts reads as follows:

> "The Plaintiff NUF, Inc. is a Utah Corporation filed and incorporated on August 12, 1993, for the purpose of continuing the business operation of NUF, Inc. a prior Utah corporation." (R. 31 at para. 1)

incorporator and director of Plaintiff NUF, Inc., a close personal friend and a business partner of Plaintiff Paul Gardner. (T1 at 124, 2-4), (T1 at 181-188) and (T2 at 79, L22 as Exh 53) Unknown to Defendants Mr. Wilkinson is a nephew of the judge who presided over the bench trial in this matter. (R 346 para. 4) Although his name and his close personal ties to the case were mentioned on at least 3 separate occasions during trial, Judge Wilkinson made no comment nor disclosure regarding his family relationship to Clayton Wilkinson. Defendants learned of the relationship well after the completion of the trial when Defendant Kenneth Madsen received an anonymous telephone call on the subject. (R 345-346) He then hired a genealogist to check whether the anonymous caller had been correct. (R 348-350) Upon receipt of the confirmation he filed a Motion for New Trial and Reassignment of Judge. (R 343)

SUMMARY OF ARGUMENTS

POINT I

THE TRIAL COURT ERRED IN FAILING TO FIND THAT PLAINTIFFS' CLAIMS AGAINST DEFENDANTS ARE BARRED BY THE DOCTRINE OF RES *JUDICATA*

Prior to the filing of their complaint in this matter, Judge Frederick had granted summary judgment against Plaintiffs on a complaint that was virtually identical to the complaint filed in this action. The complaint was filed by the same attorney, had all of the same parties in interest and arose from the same contract between Plaintiffs and Defendants Madsen. Although Plaintiffs added Paul Gardner personally as a Plaintiff, there is

no question but that Mr. Gardner was privy to, and was in fact the real party in interest on behalf of Plaintiffs in the first case. Similarly, although Plaintiffs named Nauti Lady, L.L.C. as a party defendant in the second case, the L.L.C. was formed subsequent to the contract in question and any actions by the L.L.C. preceded the summary judgment against Plaintiffs in the first case.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT CONTRARY TO THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE WRITTEN CONTRACT, PLAINTIFF PAUL GARDNER RATHER THAN NUF, INC. HAD A CONTRACTUAL CLAIM AGAINST DEFENDANTS MADSEN

Contrary to the clear and unambiguous wording of the contract between the parties, the trial judge went beyond the four corners of that document to reach a determination that Plaintiff Paul Gardner personally was a party to the contract with standing to bring this action against Defendants.

POINT III

THE TRIAL COURT ERRED IN FAILING TO APPLY THE PROPER LAW TO THE UNDISPUTED FACTS THAT THE CORPORATE PLAINTIFF HAD BEEN DISSOLVED PRIOR TO ENTRY INTO THE CONTRACT AND THAT THE CONTRACT OR ANY ATTEMPT TO ASSIGN RIGHTS UNDER THAT CONTRACT WAS THEREFORE VOID

Contrary to the finding by the trial court the dissolved corporation could not make an assignment of its rights to Plaintiff Paul Gardner. The Plaintiff corporation was dissolved prior to entry into the contract at issue and never reinstated. The contract was in no way related to the statutory entitlement to "wind up the affairs of the corporation", lacked an essential element (i.e. 2nd party) and was therefore void.

POINT IV

THE TRIAL ERRED IN ASSESSING INAPPROPRIATE DAMAGES BASED UPON THE FULL VALUE OF 30% OF THE TOTAL PRIME USAGE WHEN PLAINTIFFS HAD PURCHASED ONLY 10% OWNERSHIP IN THE ENTITY, FAILED TO ACCOUNT FOR THE VALUE OF NON-PEAK WHICH HAD BEEN EFFECTIVELY CONVERTED TO PEAK "SUMMER" WEEKS, AND IN DETERMINING THAT THE SUBSEQUENTLY FORMED LIMITED LIABILITY COMPANY WAS RESPONSIBLE FOR ANY DAMAGES TO PLAINTIFF

The measure of damages applied by the trial court was improper since Plaintiffs failed to prove that they had been denied usage of the boat. Testimony presented that they had "not used the boat" fell short of the requirement to prove denial of usage. Furthermore, the court awarded damages based upon the total value of the prime summer weeks rather than on the difference between the value of those weeks and the weeks which were admittedly made available to Plaintiffs. Finally, the trial court erred in assessing attorney's fees against Defendants under a provision of the void contract.

POINT V

THE TRIAL COURT ERRED IN FAILING TO DISCLOSE THAT HIS NEPHEW WAS A PRINCIPAL IN THE PLAINTIFF CORPORATION AND A BUSINESS PARTNER OF PLAINTIFF PAUL GARDNER, IN FAILING TO RECUSE HIMSELF AND IN FAILING TO GRANT A NEW TRIAL BEFORE AN IMPARTIAL JUDGE

The issues of the case were extremely fact sensitive, and hinged upon the credibility of the only two participants in the execution of the contract, Plaintiff Paul Gardner and Defendant Kenneth Madsen. Unbeknownst to Defendants, an incorporator and director of the corporate Plaintiff is the nephew of the trial judge. At trial on three separate occasions the name of this nephew, his affiliation to the corporate Plaintiff and the fact

that he was a "business partner and close friend" of Plaintiff Paul Gardner were disclosed. As soon as Defendants became aware of the family relationship they filed a Motion for New Trial and Reassignment of Judge, which motion was denied.

POINT VI

APPELLANTS SHOULD BE AWARDED ALL OF THEIR COSTS AND ATTORNEY'S FEES INCURRED IN THE DEFENSE OF THE ACTION AT TRIAL AND ON THIS APPEAL

Plaintiffs' filing of the second case in the face of the summary judgment previously granted by Judge Frederick rises to the requisite standard of § 78-27-56 which entitles Defendants to an award of their costs and attorney's fees incurred both at trial and on this appeal.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO FIND THAT PLAINTIFFS' CLAIMS AGAINST DEFENDANTS ARE BARRED BY THE DOCTRINE OF RES *JUDICATA*

As set forth in the facts above, Plaintiff NUF, Inc. (NUF 1) brought an action arising out of the June 15, 1990 contract before Judge J. Dennis Frederick as Civil No. 930903925. Judge Frederick granted Defendants' Motion for Summary Judgment on the basis that NUF 1 was the party to the contract, but that since the corporation had been dissolved there was no legal entity capable of bringing an action on its behalf. (R 141) That case involved the same parties in interest, although Paul Gardner was not named personally, and the subsequently filed Limited Liability Company was not name specifically as a party defendant.

From the time that the first complaint was resolved by summary judgment and until the time that the second complaint was filed there arose no additional causes of action. In fact, there were no additional transactions of any kind between the respective parties in interest and their privies.

Plaintiffs have merely attempted to circumvent the doctrine of *res judicata* by naming as a party plaintiff the person who was the real party in interest in the first case and by adding a new party defendant.

Recently, the Supreme Court analyzed the concepts of collateral *estoppel* and *res judicata* in the matter of Jones, Waldo, Holbrook and McDonough v. Jerilyn Shelton Dawson, 298 Utah Adv. Rep 8 (1996) citing Sevy v. Security Title Co., 902 P.2d 629 (Utah 1995) Justice Howe stated that

> "...issue preclusion prevents the parties from relitigating issues resolved in a prior related action. The parties seeking collateral estoppel must first satisfy four requirements. First, the issue challenged must be identical in the previous action and the case at hand. The issue must have been decided in a final judgment on the merits in the previous action. Third, the issue must have been completely, fully, and fairly litigated in the previous action. Fourth, the party against whom collateral estoppel is invoked in the current action must have been either a party or privy to a party in the previous action." Id. at 4 citing Sevy (other citations omitted)

In the case at hand, Plaintiff NUF, Inc. brought the identical contract claim against Defendants Madsen, the parties with whom they entered into their contract. As cited above, with the exception of the addition of Paul Gardner as a named

Plaintiff and the Limited Liability Company as a named Defendant, the first five counts of Plaintiff's second complaint were verbatim the same as the first complaint. The sixth count, although adding a purported cause of action against the Limited Liability Company, did not raise any issues that did not exist at the time that Judge Frederick entered his judgment.

On the second criteria, Judge Frederick's summary judgment was, in fact, a final judgment on the merits based upon existing law.

The third criteria is also satisfied in that the issues were fully presented to Judge Frederick fully and completely in an exhaustive brief by Plaintiffs. At no time have Plaintiffs claimed that the issue was not competently presented to Judge Frederick.

With respect to the fourth criteria, Paul Gardner's testimony throughout the trial clearly indicated that NUF, Inc. was a closely held corporation, which he treated almost as an "alter ego". Although he was not physically named in the first case, as president of NUF, Inc. he was clearly privy to that party in the previous action.

In the earlier case of Jacobsen v. Jacobsen, 703 P.2d 303 (Utah 1985) Justice Durham citing Mendenhall v. Kingston, 610 P.2d 1287, 1289 (Utah 1980) defined the doctrine of *res judicata* as follows:

> "When there has been a adjudication, it becomes res judicata as to those issues which were either tried and determined or upon all issues which the party had a fair opportunity

> to present and have determined in the other proceeding. Jacobsen at 305.

Gardner and NUF, Inc. were capable of presenting all of the issues claimed in the second case when the matter was presented to Judge Frederick for summary judgment in the first case. Particularly, in light of Defendant's Motions to Dismiss and Motions for Summary Judgment in the second case on the basis of *res judicata* and the dissolution of the corporation, the burden was placed upon Plaintiffs to show that for some reason they were unable to present any additional claims that were made in the second case. Plaintiffs failed to do so, and their failure estops them from denying that the second action was barred by the doctrine.

POINT II

THE TRIAL COURT ERRED IN FINDING THAT CONTRARY TO THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE WRITTEN CONTRACT, PLAINTIFF PAUL GARDNER RATHER THAN NUF, INC. HAD A CONTRACTUAL CLAIM AGAINST DEFENDANTS MADSEN

"To preserve the sanctity of written instruments, the intent of the parties to a written integrated contract should be found within the four corners of that instrument." Stanger v. Sentinel Sec. Life Ins. Co., 669 P.2d 1205 (Utah 1983) *citing* Utah Valley Bank v. Tanner, 636 P.2d 1060 (Utah 1981) (emphasis in original.)

> "The doctrine of partial integration is that where a written contract is obviously not, or is shown not to be, the complete contract, parol evidence not inconsistent with the writing is admissible to show what the entire contract really was, by supplementing as distinguished from contradicting, the writing". Id. at 1205.

In the present case there is no finding by the court, nor was there any evidence admitted at the trial, that the contract in question was incomplete. Within the "four corners" of the contract, the Buyer was "NUF, Inc. a Utah Corporation" and the Sellers were defined as Kenneth Madsen and Marilyn Madsen. The clarity of this position, and the intent of the parties is further substantiated by the manner in which the contract was signed on behalf of Buyer, i.e. "NUF, Inc. by [Gardner's signature]". The signature form was handwritten by Plaintiff Paul Gardner on the June 15, 1990 contract and on the undated supplemental change shown on the last page of the contract (when NUF 1 purported to purchase an additional interest in wave runners). (Pl Exh. 11; Def Exh. 2)

In Stanger, the Supreme Court allowed parol evidence, but it was on an issue that was not specifically covered by the written contract. In the case at hand, the parties are clearly defined and no parol evidence is necessary to make that determination. More recently this Court has ruled in Sprouse v. Jager, 806 P.2d 219 (Utah App. 1991) that:

> "The settled rule for interpreting a contract is to first 'look to the four corners of the agreement to determine the intention of the parties. The use of extrinsic evidence is permitted only if the document appears to incompletely express the parties' agreement or if it is ambiguous in expressing that agreement'." citing Ron Case Roofing and Asphalt, Inc. v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989) (other citations omitted)

The law is clear that there are essential requirements to any contract. These elements are (1) proper subject matter; (2)

an offer and acceptance; (3) competent parties; and (4) appropriate consideration. Bench v. Bechtel Civil & Minerals, Inc., 758 P.2d 460 (Utah App. 1988) *See also* Sugarhouse Finance Company v. Anderson, 610 P.2d 1369, 1372 (Utah 1980).

Although paragraph 4 of the contract at issue here is not as artfully drafted by Defendants as would be the case had the contract been prepared by legal counsel, the Utah Supreme Court has made it clear on numerous occasions that the contract should be interpreted "in accordance with the ordinary accepted meaning of the words used." Ephraim Theater Company v. Hawk, 1321 P.2d 223, 7 Utah 2nd 166 (Utah 1958) The Ephraim court held that:

> "The understanding thus expressed is plain and provides no justification for a finding based upon conduct, that the defendants had a firm obligation to pay the rent regardless of income from the business. Unless uncertainty opens the door to extraneous explanation, the trial court is in no position of advantage in interpreting documents, and his views thereon are not indulged any special credit as are findings on issues of fact." Id. at 167, fn 2.

For the trial court to find, contrary to the specific and unambiguous terms of the contract itself that the agreement was between Paul Gardner personally and Madsens is clearly an abuse of discretion.

POINT III

THE TRIAL COURT ERRED IN FAILING TO APPLY THE PROPER LAW TO THE UNDISPUTED FACTS THAT THE CORPORATE PLAINTIFF HAD BEEN DISSOLVED PRIOR TO ENTRY INTO THE CONTRACT AND THAT THE CONTRACT OR ANY ATTEMPT TO ASSIGN RIGHTS UNDER THAT CONTRACT WAS THEREFORE VOID

Plaintiff NUF Inc. (NUF 1) was dissolved on May 1, 1990. No

action was ever taken to reinstate the corporation. § 16-10-88.2(4) of the Utah Code Annotated, as in effect on June 15, 1990, provides that:

> The dissolution of any corporation precludes that corporation from doing business in its corporate character under any name or assumed names filed on behalf of the dissolved corporation under Section 42-2-5. (Emphasis added)

Subsection 5 of that section did, at that time, provide for a reinstatement within one (1) year after the dissolution, subject to certain conditions:

> (5) Any corporation which has been dissolved under this section may, within one year from the date of dissolution, be reinstated upon application and payment of all past due taxes, penalties, and reinstatement fees.

There is no evidence in the record that NUF, Inc. made any effort at reinstatement. In fact, the principals filed a new corporation, by the same name, for the purported purpose of "continuing the business operation of NUF, Inc., a prior Utah corporation". (R 31)

Finally, § 16-10-100 of the Utah Business Corporation Act then in effect provided that a corporation may pursue any remedies available to it so long as the action is commenced within two years of the dissolution.

> "The dissolution of a corporation either (1) by the issuance of a Certificate of Dissolution by the Division of Corporations and Commercial Code, ... shall not take away any remedy available to or against the corporation, its directors, officers or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other

> proceeding thereon is commenced within two years after the date of such dissolution."

The Utah Court of Appeals interpreted this provision in the case of Murphy v. Crosland, 886 P.2d 74 (Utah App. 1994). This Court said that a corporation does not have authority to conduct business when its right to conduct business has been suspended. Id at 80.

In a case analogous to the one at hand, the Utah Supreme Court, in analyzing a contract dispute involving a municipal corporation stated that:

> Any contract, express or implied, between plaintiffs and the county is subject to the statutory and constitutional limitations on the county as a governing body. The county only has those rights and powers granted it by the Utah Constitution and statutes or those implied as a necessary means to accomplish them. Any act by the county in excess of this authority or forbidden by the Utah Constitution is null and void as an ultra vires act. Weese v. Davis County Commission, 834 P.2d 1 (Utah 1992).

It is also clear that when a purported contract is missing an essential material element, then the contract is void. By analogy, if one party is precluded by law from entering into a marriage, but purports to do so, then the marriage contract is considered to be void *ab initio*. Anderson v. Anderson, 240 P.2d 966, 121 Utah 237 (Utah 1952).

In their memorandum in opposition to Defendants' Motion for Summary Judge Plaintiffs' claimed standing under the common law as a *de facto* corporation. However, under the common law, a corporation was considered to be extinct for all purposes once it

had been dissolved. 19 Am Jur 2d Corporations, Section 2838.

In 1994 this Court verified this position in the case of Murphy v. Crosland, 886 P.2d 74 (Utah App. 1994) when it said:

> No corporation de facto could exist under the common law where the corporation's charter had been revoked by judicial decree or statutory forfeiture [amounting to involuntary dissolution]. Fletcher Sec. 3844, cited in Murphy v. Crosland, 886 P.2d at 78 (Utah App. 1994).

This case dealt with the Utah Business Corporation Act which was in effect in 1990, prior to the 1992 amendments. Crosland Industries, Inc. was suspended for failure to file an annual report in 1987 and was dissolved in 1988 for failure to restore its good standing.

The Murphy court continued:

> "According to a number of cases, a corporation which has been dissolved...is not even a de facto corporation for the reason that there can be no corporation de facto when there cannot be a corporation de jure, and that there can be no color of corporate existence after the corporate death." Id at 78.

More recently, in the case of Holman v. Callister, Duncan & Nebeker, 905 P.2d 895 (Utah App. 1995), in the context of a malpractice action brought by principals of a dissolved corporation against their attorneys, this Court reaffirmed that: "Under a common law the corporation ceased to exist at dissolution," citing Platz v. International Smelting Co., 61 Utah 342, 350-51, 213 P. 187, 190 (1922). For that reason, a dissolved corporation was

> "incapable of maintaining an action; and all

> such actions pending at the time of dissolution abate, in the absence of a statute to the contrary." citing Holman v. Callister, Duncan & Nebeker, 905 P.2d at 897-898, also citing Chicago Title and Trust Co. v. 4136 Wilcox Bldg. Corp., 402 U.S. 120, 125, 58 S.Ct. 125, 127, 82 L.Ed. 147 (1937).

Similarly, under the common law:

> "If a state has already acted to terminate the corporation's existence, a private party may raise the lack of corporate existence as a defense to an action involving purely private rights." 19 Am Jur 2d Corporations, Section 2825 (citing Hearth Corp. v. C.B.R. Dev. Co., 210 NW2d 632 (Iowa).

In this case, Defendants clearly raised the lack of corporate existence as a defense to the action. (R 13 and 120) In fact, it was this defense which resulted in Judge Frederick granting summary judgment against Plaintiffs in the original case. It was the subject of Defendants' Motion to Dismiss in this action, and Defendants' Motion for Summary Judgment, Plaintiffs' claim against Defendants clearly involved a private contract right, as opposed to a public policy right. Id. at 635.

Pursuant to the statutes set forth in the Utah Business Corporations Act as it existed in 1990, § 16-10-88.2 clearly sets forth that the corporations' authority to conduct business as usual has been suspended.

> "The dissolution of a corporation becomes operative for all purposes at the termination of the period allowed by statute for the settlement and winding up of its affairs; as a general rule, it becomes entirely extinct as a corporation, and its powers cease." 19 Am Jur 2d Corporations, Section 2840 (citing Clark v. American Cannel Coal Co., 165 Ind 213, 73 NE 1083; Connecticut Mut. Life Ins. Co. v. Dunscomb, 108 Tenn 724, 69 SW 345).

This provision was interpreted in Murphy v. Crosland, where this Court said that

> "...corporate suspension under UBCA section 16-10-88.2 resulted in suspension of a corporation's authority to conduct business as usual. A corporation suspended under this statute could engage only in activities necessary to wind up its affairs or to remedy its suspension. UBCA Section 16-10-139 applies to a suspended corporation; anyone acting on the corporations' behalf who exceeds the corporations remaining authority is jointly and severally liable for debts and liabilities incurred as a result." Id. at 84.

The Murphy court refers to a footnote in the Utah Supreme Court case of MacKay and Knobel Enters. v. Teton Van Gas, Inc., 460 P.2d at 829 (1969) in which the Court defined the concept of winding up its affairs to include protection of assets, paying creditors and "otherwise winding up its business." Id. fn. 17.

In making its finding that Plaintiff Paul Gardner should have the benefit of the NUF contract, the trial court appears to have extrapolated the statutory extension of liability referred to in § 16-10-139 above. (R. 277 at P3 L16 through P4 L5) This ruling is clearly inconsistent with this Court's ruling in Holman. In that case as this, the plaintiff either held or controlled all of the shares of stock of the defunct corporation. Holman was the sole director or officer of the defunct corporation, and Holman personally relied on the advice given by the attorney against whom the malpractice claim was made. Holman at 899.

It is interesting to note that Mr. Holman also claimed that

he had been personally damaged as a result of the negligent services performed on behalf of the defunct corporation, as a result of an implied attorney-client relationship, but that this Court was not willing to extend any corporate remedies to him as a result of that claim.

Although § 16-10-100 of the Utah Code Annotated (repealed July 1, 1992) did provide a 2 year period during which the principals of a corporation could pursue a claim on behalf of the corporation, even the first action filed by Plaintiffs in this matter was filed more than two years after the date of the dissolution. In Holman, this Court refused to allow Plaintiff to proceed on the basis of this statute." Id. at 897. The same rule should apply in this case.

Since NUF, Inc. was dissolved prior to the date of the contract, then Paul Gardner had no legal capacity to enter into the contract with Defendants. Since that left the contract without the requisite parties, the contract was void. And, although the statute provides that Paul Gardner may be personally liable for the tort and contract damages incurred by Defendants as a result of his acting without authority, neither the statutes nor the case law provide a basis for Mr. Gardner to benefit from his violation of the statutes.

Although the trial court was concerned that there had been an assignment of the corporation's rights to Mr. Gardner, such an assignment would be clearly impossible under the facts of the case. (R 277 at P3, 1-15) Specifically, although Plaintiffs

provided no specific dates, no minutes, no resolutions nor any other documentation regarding an assignment, it is clear that the meeting at which they claimed the assignment took place occurred prior to June 15, 1990, the date on which the contract was executed. (T1 at 125) Since Plaintiffs claim that the meeting took place before May 1, 1990, then no contract had been entered into and therefore no rights existed which were capable of assignment. Similarly, there is no evidence of any consideration transferred from Mr. Gardner to the corporation, that being an essential element of such an assignment. Finally, any provisional or assignment of future rights would have ceased to exist on May 1, 1990, when the corporation was dissolved.

Clearly, entry into a new contract for use of a houseboat did not fit within the purview of the statutory two year extension. Similarly, it is clear that the period of two years had long since expired prior to Mr. Gardner filing either of the actions against Madsens on behalf of the dissolved corporation.

After dissolution, NUF, Inc. had no powers to enter into a contract, nor did it have any power granted from the state of Utah to pursue any litigation against Defendants. As in Weese, the purported contract was null and void.

POINT IV

THE TRIAL COURT ERRED IN ASSESSING DAMAGES BASED UPON THE FULL VALUE OF 30% OF THE TOTAL PRIME USAGE WHEN PLAINTIFFS HAD PURCHASED ONLY 10% OWNERSHIP IN THE ENTITY, FAILED TO ACCOUNT FOR THE VALUE OF NON-PEAK WEEKS WHICH HAD BEEN EFFECTIVELY CONVERTED TO PEAK "SUMMER" WEEKS, AND IN DETERMINING THAT THE SUBSEQUENTLY FORMED LIMITED LIABILITY COMPANY WAS RESPONSIBLE FOR ANY DAMAGES TO PLAINTIFF

The Restatement of Contracts 2d recognizes that judicial remedies for breach of contract serve to protect one or more of the following interests of a promisee:

> "(a) his 'expectation interest', which is the interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed;
>
> (b) his 'reliance interest', which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made; or
>
> (c) his 'restitution interest', which is his interest in having restored to him any benefit that he has conferred on the other party." (*cited* in 22 Am Jur 2d, Damage, § 43)

By way of explanation to subparagraph a, Am Jur provides the following:

> "Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of the bargain by awarding a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed. Moreover, his recovery is limited to the loss he has actually suffered by reason of the breach; he is not entitled to be placed in a better position than he would have been in if the contract had not been broken". 22 Am Jur 2d Damages, Section 45.

At trial Plaintiff Gardner made some broad sweeping allegations regarding unavailability of requested dates, but

provided only one instance where he had been actually been denied the use of the houseboat. (T1 at 64-65) That denial was for Week #27 of 1993 which was declared by Madsens to be "forfeited" as a result of Gardner's repeated violation of the houseboat rules, the most recent of which had arisen from the conclusive proof obtained by Madsens that Gardner had kept his dog on the houseboat during the first week of usage in June of 1993. There is a major gap between Mr. Gardner simply not scheduling the boat for use and his being deprived of usage by Defendants.

In reality, simple arithmetic leads to the conclusion that 10% of the houseboat usage during a calendar year would entitle an owner to 5.2 weeks usage, with that usage spread proportionately throughout the year. Under such a proportional distribution, 2 of those weeks would be treated as "summer" weeks under the court's definition. R 277, P 14, L 22) With a reasonable expectation of down-time for repairs on the boat of 2 weeks, each 10% owner would then be entitled to 5 weeks usage throughout the year, which is exactly what the unmodified contract provided. That is consistent with both parties testimony regarding the expectation of additional partners, and particularly Mr. Madsen's testimony that they anticipated a total of 4 additional owners besides themselves in order to spread the maintenance costs but retain at least 55% ownership in the boat, as stated in the contract. (T1 at 239) As shown on his copy of the contract, Mr. Madsen did agree that he had changed five weeks to six weeks and had initialled that change. (T1 at 240, D. Exh.

2) Clearly this is not a major shift in usage, and could be easily absorbed from the Madsens' retaining interest. However, to have agreed to six or seven summer weeks for one 10% owner, as claimed by Plaintiff, would have resulted in the loss of 30-35% of the prime summer weeks. Clearly Madsens could not sustain such an allocation with a total of 4 partners if each had 10% particularly if each received the same deal.

If it was the intent of the contract to provide six weeks, then two would be prime "summer" weeks which was defined by the court as May 1 through September 30. R 277, P 14, L 22), then the remaining 4 would be non-peak weeks for which the non-peak rental rate would be the comparable measure of value to that accepted by the trial court.

Therefore, even if the court found that Plaintiffs were entitled to 6 summer weeks, given the fact that there was no evidence that non-peak weeks were withheld, the appropriate measure of Plaintiffs' damages would be the value of the premium weeks less the value of the non-premium weeks which were actually made available. Unfortunately, the court refused to allow testimony as to the value of non-peak weeks, although Defendants' Exhibit 3 which was admitted does show a non-peak value of $1199 per week. Therefore, if the non-peak weeks were worth $1199 and the court found that the summer weeks were worth $1800, then Plaintiffs would be entitled to the difference between the two or $601 per week for each week which they prove that they were denied usage.

By totally disregarding the value of the non-peak weeks, the court grossly inflated the damages awarded to Plaintiffs, thereby resulting in an award that was nearly 8 times the original purchase price for the contract. (R 414-415)

Finally, in making its calculation of damages, the court found that Plaintiffs had utilized the boat during 6 weeks, when by the testimony of Paul Gardner he admitted having used the boat for 9 weeks. (R 277, P 14, cf T1 at 63, 18-19)

In actuality, since the contract with NUF 1 was void, Madsens are entitled to damages under either subsection b or subsection c of the Restatement of Contracts 2d, cited above. In order to return Madsens to a position as good as they would have been in had they not relied upon the contract, Madsens should be reimbursed in the amount of $1800 per week for a minimum of the 9 weeks which Plaintiff Gardner testified that he used the boat, plus reimbursement for the damages actually caused to the boat by Plaintiffs during periods of their exclusive use and control.

Under subsection c of the Restatement position, Defendants would be entitled to the value of any benefit that they conferred upon Plaintiffs. As noted in Am Jur 2d

> "Restitution is a common form of relief in contract cases. Its objective is not the enforcement of the contract through protection of a party's expectation or reliance interests, but the prevention of unjust enrichment. The restitution interest is the interest of the non-defaulting party in the benefit which he conferred on the person in default of the contract and prior to its breach." 22 Am Jur 2d, Damages, Section 54.

In this particular case, the position in subsections b and c essentially go "hand in glove" with each other. That usage which was conferred upon Plaintiffs was the same usage which was denied to Defendants.

The more difficult question is whether or not defendants are entitled to restitution for the costs of the damages caused to the boat during the time that it was under the exclusive control of Plaintiff Paul Gardner. As mentioned above, the trial court found that Defendants had failed to prove negligence on the part of Plaintiffs with respect to the major damage to the outdrives and engines. In doing so, the court ignored the doctrine of *res ipsa loquitur* with respect to those issues, while obviously applying that doctrine to the damage that was caused to the refrigerator while the boat was under Gardner's control. (R 277 at P 12, 15-16)

Defendants admittedly could not prove that they observed Plaintiffs negligent operation of the boat which caused the damage to the propellers and outdrives, but they did provide testimony that when the boat was used last prior to Mr. Gardner taking the boat it was in good working order and that when it was next observed after Gardner's usage, the damage was discovered. (T1 at 209-217)

Unfortunately, any case involving damages or negligence outside the presence of a third party is a difficult fact issue. The trier of fact has broad discretion in making its findings. Therefore, the impartiality of the judge is even more essential

to the integrity of the legal process in situations like this.

POINT V

THE TRIAL COURT ERRED IN FAILING TO DISCLOSE THAT HIS NEPHEW WAS A PRINCIPAL IN THE PLAINTIFF CORPORATION AND A BUSINESS PARTNER OF PLAINTIFF PAUL GARDNER, IN FAILING TO RECUSE HIMSELF AND IN FAILING TO GRANT A NEW TRIAL BEFORE AN IMPARTIAL JUDGE

The evidence is undisputed that Clayton H. Wilkinson is the nephew of the trial judge, Homer F. Wilkinson. As the son of Judge Wilkinson's brother, Clayton Wilkinson clearly fits in to the definition of a "third-degree relationship" as set forth in the Code of Judicial Conduct. (See Appendix B) It is undisputed that Defendants had no knowledge of the family relationship between the Judge and his nephew until well after the completion of the trial. (R 345-346) The evidence is undisputed that on receiving information regarding a possible conflict Defendants took timely action to verify the allegation and then promptly filed their Motion for New Trial and Reassignment of Judge. (R 343-346) Finally, it is clear that Judge Wilkinson never gave any indication to the parties that Clayton Wilkinson was, in fact, his nephew or that there was any possibility of a conflict of interest due to that relationship.

The Utah Supreme Court has taken a very stringent view toward the disqualification of judges when there is an apparent conflict of interest. The stringency of this posture was clearly set forth in the case of Regional Sales Agency, Inc. v. Reichert, 830 P.2d 252 (Utah 1992) where the Supreme Court reversed a unanimous Court of Appeals decision under circumstances where one

of the three judges was related by marriage to two partners in a law firm representing one of the parties before the court. The relationship in that case was brother-in-law and father-in-law, and there was no indication that Judge Billings would share in any pecuniary interest as a result of her relationship; the relatives had no visible participation in the case. Id. at 254.

In Regional Sales Agency, Inc. Appellant challenged Judge Billings participation on three grounds:

> "First, Section 78-7-1 of the Code requires judicial disqualification when the judge has a relationship of consanguinity or affinity within the third degree of a "party" to the action, Utah Code Ann. Sec 78-7-1(1)(b) (1991); second, canon 3(C)(1)(d) of the Utah Code of Judicial Conduct ("U.C.J.C.") requires disqualification when a judge presides over a case in which relatives within the third degree of relationship have an "interest" that would be "affected by the outcome," U.C.J.C. canon 3(C)(1)(d)(1990); and third, canon 2 of the U.C.J.C. requires disqualification in circumstances that create an appearance of judicial impropriety, U.C.J.C. canon 2 (1990). Id. at 255, 256.

The Supreme Court did not reach the first and third objections, since the matter was reversed on the second ground. Id. at 256.

The facts of that case were similar to those in the instant action since the party raising the disqualification issue was not aware of the conflict of interest at the time that the matter was heard and decided in the Court. Id. at 254. As in this case, appellant made no contention that the judge's failure to disqualify herself was either "intentional or malicious" or that the judge would have acted differently if the firm to which her

relatives by marriage had not been involved. Id. at 256. Appellant there did argue, however that the judge's participation in the case created..."an appearance of impropriety" Id. at 256.

As this case, the Regional Sales Agency, Inc., relationship between the judge in question and the interested party was..."within the third-degree of relationship to Judge...or her husband." Id. at 256.

In determining "an interest that could be substantially affected," the Regional Sales Agency court analyzed several factors and ultimately reached a "brightline proscription". Id. at 257. Judge Zimmerman stated that proscription as follows:

> We therefore conclude that under Canon 3, a relative of the requisite degree of relationship has an "interest" that might be sufficiently "affected by the outcome" of a case in every situation where a judge sits on a case in which the judge's relative is a partner or otherwise an equity participant in a firm that represents a party to the case. id at 257 (emphasis in original)

In this case, Clayton Wilkinson is not an attorney partner in a law firm but he is clearly a "partner or otherwise an equity participant" in the Plaintiff corporation and partner with Plaintiff Gardner. Judge Wilkinson knew this on at least 3 different occasions. In one instance Mr. Gardner testified that the nephew was his "business partner in the real estate company". (T1 at 124, 2-4) In spite of those revelations, Judge Wilkinson gave no indication that he had a nephew with the name Clayton Wilkinson, nor did he take any other action which might reasonably place Defendants on notice of the conflict of

interest.

In Regional Sales Agency, Justice Howe in his dissent expresses a concern that appellant had not made a timely and appropriate objection at the time that the matter was before the Court of Appeals. Id. at 259. The majority however felt that the issue of judicial integrity was so significant that the issue must be dealt with in any event. That logic is even more compelling here since the trial judge did know of the relationship, but failed to disclose the fact.

Finally, in Regional Sales Agency the appellate court judge disqualified was one of 3 judges who had voted unanimously on the case, under circumstances where the issues over which those judges had power were significantly narrowed by the Rules of Appellate Procedure and the fact that the court was more concerned with legal issues than fine-line factual determinations. As was set forth above, as the trier of fact in this case, Judge Wilkinson was empowered to make factual determinations within a wide range of discretionary power. The issues which he decided were hotly contested, and hinged on his determination as to the credibility of witnesses giving diametrically opposed testimony. In making his factual determinations, he also apparently disregarded the unopposed testimony of the forensic document expert.

Under these circumstances the integrity of the judicial system is far more susceptible to challenge as a result of the appearance of a very significant conflict of interest on the part

of the trier of fact than was the case in Regional Sales.

Just as the Supreme Court remanded Regional Sales Agency to the Court of Appeals for a new hearing before a different panel, if this Court finds that there is a contract and a party with an enforceable interest to that contract, then this matter should be remanded to the District Court for a new trial before a judge who has not previously participated in the case.

POINT VI

APPELLANTS SHOULD BE AWARDED THEIR COSTS AND ATTORNEY'S FEES INCURRED IN THE DEFENSE OF THE ACTION AT TRIAL AND ON THIS APPEAL

Pursuant to Rule 34 of the Utah Code of Appellate Procedure, parties to an appeal are entitled to their costs on appeal. Similarly, where the trial court has awarded attorney's fees below, the appellate court may award attorney's fees on appeal where authorized by statute or rule of court. Christensen v. Abbott, 671 P.2d 121,123 (Utah 1983).

It is also clear that where a contract provides for attorney's fees, they should be awarded on appeal. The rule defined by Justice Wilkins is:

> "We therefore adopt the rule of law that a provision of payment for attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as at trial, if the action is brought to enforce the contract..." Management Services Corp. v. Development Assoc., 617 P.2d 406, 409 (Utah 1980)

In the present case, Appellant is faced with having incurred very substantial attorney's fees in defending 2 actions brought by Plaintiffs on a void contract, where the party to that

contract has been dissolved. The question then becomes whether Appellants should be entitled to their costs and attorney's fees pursuant to the underlying contract provision when the contract itself is void. Case law on this point is non-existent, but the court can unquestionably award these costs and fees pursuant to statute.

Section 78-26-56 of the Utah Code Annotated (1953, as amended) provides for an award of attorney's fees when there is no contractual provision.

> (1) In civil actions, the court shall award reasonable attorney's fees to the prevailing party if the court determines that the action or defense of the action was without merit and not brought or asserted in good faith under Subsection (2).

In Baldwin v. Burton, 850 P.2d 1188 (Utah 1993) citing the case of Cady v. Johnson, 671 P.2d 149, 151 (Utah 1983) the Supreme Court defined....

> "without merit" means "frivolous" or "having no basis in law or fact" for purpose of § 78-27-56, we found the terms "lack of good faith" and "bad faith" to be synonymous. To establish bad faith, one or more of the following must be lacking:
>
> (1) an honest belief in the propriety of the activities in question;
>
> (2) no intent to take unconscionable advantage of others;
>
> (3) no intent to, or knowledge of the fact that the activities in question will,[sic] hinder, delay or defraud others."Id. at 1199

In the case before the court, Defendants have clearly demonstrated the requisite bad faith to warrant an award of

attorney's fees under this provision. In the first case they brought an action on behalf of a dissolved corporation with no standing in the courts, on a contract that was void. While there may be an argument that this was or could have been done in the furtherance of any arguable claim, such is clearly not the case with the second action brought by the same attorney and the same principals. At the time that Plaintiffs filed this action there had already been a determination by Judge Frederick in the first case that there was no cause of action. To bring a second action, utilizing a complaint that was essentially the same document as the first complaint, (with the exception of adding the real party in interest as Plaintiff, and a related party in interest as a Defendant) does not meet the test for good faith. Clearly any rights which Mr. Gardner had, if any, existed prior to the filing of the first complaint. Similarly, the latter named Limited Liability Company which was named in the second case as a Defendant existed at the time that the first complaint was filed, and any allegations subsequently made by Plaintiffs against that entity transpired prior to the entry of the unappealed judgment against them on the first complaint.

Mr. Gardner, as the moving party in both cases was clearly "privy" to the Plaintiff in the first case and all issues raised in the second case could have been litigated prior to entry of the first judgment. Jones, Waldo, Holbrook and McDonough v. Jerilyn Shelton Dawson, 298 Utah Adv. Rep 8 (1996) and Jacobsen v. Jacobsen, 703 P.2d 303 (Utah 1985). Plaintiffs' conduct in

this case is as much bad faith as the proscribed conduct in Schoney v. Memorial Estates, Inc., 863 P.2d 59 (Ut. App. 1993) where this Court awarded attorney's fees and double costs. Id at 62.

CONCLUSION

The trial in this matter should never have continued after the mention of Clayton H. Wilkinson and his relationship to Plaintiffs in the case. Had the fact of that relationship been revealed by the trial judge Defendants would have understandably asked for a disqualification and a new trial. Unfortunately, the court gave no indication of the conflict nor any disclosure of the relationship. This conflict of interest clouds the entire proceeding and casts serious doubt upon the integrity of the judicial system, particularly in light of the gross inconsistencies between the rulings made by Judge Wilkinson in this case and those on the same issues when they were previously presented to Judge Frederick on the earlier case.

To reach the ruling which he did, the court had to disregard the claims of *res judicata* and corporate dissolution that were thoroughly briefed in Defendants' Motion to Dismiss and Motion for Summary Judgment. He further had to disregard the clear and unambiguous content of the written content and the uncontradicted testimony of the forensic document expert. The court also ignored the fact that Plaintiffs failed to prove "denial" of usage and the obvious contradictions and mis-statements and testimony of Paul Gardner and his wife Beverly Gardner.

The court awarded monetary damages to Plaintiffs that were clearly inconsistent with what they had proved to have been "denied usage". The court's measure of damages also ignored the residual value of the weeks that were unquestionably made available to Plaintiffs, by awarding them the entire value of each summer week. In fact, those damages were based upon 6 weeks actual usage rather than the 9 weeks as testified to by Plaintiff Paul Gardner.

Finally, the court erred in failing to award costs and attorney's fees to Defendants either under the terms of the contract itself or pursuant to § 78-27-56 (UCA, 1953) and further by making an award of costs and attorney's fees in favor of Plaintiffs.

Appellants therefore respectfully request that this Court reverse the trial court's finding as a matter of law with respect to the issues of *res judicata* and corporate dissolution, and remand the matter to the district court for trial before a new judge on the issue of damages which should be awarded to Defendants/Appellants, and on the issue of costs and attorney's fees.

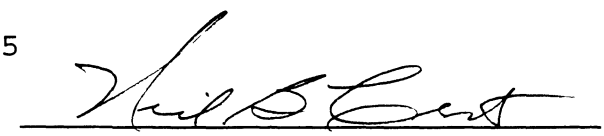
RESPECTFULLY submitted this 20th day of February, 1997.

NEIL B. CRIST
Attorney for Defendants

CERTIFICATE OF HAND-DELIVERY

I certify that I caused to be hand-delivered two true and correct copies of the foregoing document to the following individual at the address shown, on this 20th day of February, 1997:

Lowell V. Summerhays
Attorney at Law
6400 Commerce Park
448 East 6400 South, Suite 135
Murray, UT 84107



ADDENDUM

APPENDIX A: § 16-10-51 of the Code Annotated (Utah Business Corporation Act as effective 1990)

§ 16-10-88.2 of the Code Annotated (Utah Business Corporation Act as effective 1990)

§ 16-10-100 of the Code Annotated (Utah Business Corporation Act as effective 1990)

APPENDIX B: Utah Code of Judicial Conduct: Terminology - (1) "Economic interest"; (2) "Third degree of relationship"; and Canon 1; Canon 2 A and B; and Canon 3 E(1)(c)(d)(i-iv) and F.

APPENDIX C: Trial Court Ruling

16-10-88.2. Suspension — Notice — Failure to remove suspension.

(1) A domestic corporation that remains delinquent for more than 30 days after the mailing of the notice of delinquency under Section 16-10-88.1 shall be suspended. If a corporation is suspended under this section or under Section 59-7-155, the division shall mail a notice of suspension to the corporation, unless the corporation's certificate of incorporation is already suspended for any reason. A corporation that is suspended continues its corporate existence and may carry on any business so long as it also takes the necessary steps to remedy its suspended status and restore the corporation to good standing.

(2) A notice of suspension shall state:

(a) that the certificate of incorporation of the corporation has been suspended;

(b) the reason for the suspension;

(c) the date of the suspension;

(d) that the corporation may remove the suspension by correcting the delinquency and paying a reinstatement fee determined by the division pursuant to Subsection 63-38-3 (2), or, if its certificate of incorporation has been suspended under Section 59-7-155, by complying with the provisions of Section 59-7-157; and

(e) that the corporation will be dissolved 120 days after the date of mailing the notice of suspension unless the corporation has removed the suspension before that time.

(3) The division shall include an annual report form with any notice of suspension under this section for failure to file an annual report.

(4) If the corporation does not remove the suspension within 120 days after the date of mailing the notice of suspension, the corporation shall be dissolved; the division shall mail a certificate of dissolution to the corporation. No corporation so dissolved may be revived under this chapter or Section 59-7-157, except as set forth in Subsection (5). The dissolution of any corporation precludes that corporation from doing business in its corporate character under any name or assumed names filed on behalf of the dissolved corporation under Section 42-2-5. On the date of dissolution, the corporation's right in any assumed names it may use is suspended. The name of the dissolved corporation and any assumed names filed on its behalf are not available for one year from the date of dissolution for use by any other domestic corporation, foreign corporation transacting business in this state, or person doing business under an assumed name under Section 42-2-5.

(5) Any corporation which has been dissolved under this section may, within one year from the date of dissolution, be reinstated upon application and payment of all past due taxes, penalties, and reinstatement fees.

(6) All notices and certificates under this section shall be mailed first-class, postage prepaid, and shall be addressed separately to the registered agent and at least one officer of the corporation who is not the registered agent or to two officers if there is no registered agent of record, at their most current mailing addresses appearing on the records of the division.

History: C. 1953, 66-10-88.2, enacted by L. 1987, ch. 66, § 13; 1988, ch. 222, § 9; 1990, ch. 108, § 16.

Repeals and Reenactments. — Laws 1987, ch. 66, § 13 repeals former § 66-10-88.2, as enacted by Laws 1985, ch. 178, § 57, relating to

16-10-100. Survival of remedy after dissolution.

The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Division of Corporations and Commercial Code, or (2) by a decree of court when the court has not liquidated the assets and business of the corporation as provided in this act, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against the corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time during such period of two years so as to extend its period of duration.

History: L. 1961, ch. 28, § 100; 1984, ch. 66, § 115.

Meaning of "this act." — See the note under the same catchline following § 16-10-66.

APPENDIX A

CHAPTER 12
CODE OF JUDICIAL CONDUCT

ADOPTED JANUARY 1, 1994

Compiler's Notes. — The Code of Judicial Conduct is repealed and reenacted effective January 1, 1994.

TERMINOLOGY

"Candidate" means a non-judge seeking selection for judicial office, or a judge seeking selection for or retention in judicial or non-judicial office. A person becomes a candidate as soon as the person makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support, whichever occurs first.

"De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality.

"Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization, does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

"Family" denotes a spouse, child, grandchild, parent, grandparent or other relative or person with whom the judge maintains a close familial relationship.

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.

"Judge Pro Tempore." A judge pro tempore is a lawyer who is serving as a specially appointed judge pro tempore pursuant to Utah Code Ann. § 78-6-1.5 or Article VIII, § 4 of the Utah Constitution.

"May" denotes discretionary conduct or conduct that is not covered by specific proscriptions.

"Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

"Shall" and "shall not" impose binding obligations to respectively engage in or refrain from the described conduct. The failure to act in accordance with those obligations can result in disciplinary action.

"Should" and "should not" are used to indicate conduct that is respectively encouraged or discouraged. The failure to engage in or refrain from such conduct cannot result in disciplinary action.

"Third degree of relationship" denotes the following relatives: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

CANON 1

A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and shall personally observe, high standards of conduct so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

CANON 2

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL ACTIVITIES.

A. A judge shall respect and comply with the law and should exhibit conduct that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of the judicial office to advance the private interests of others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness but may provide honest references in the regular course of business or social life.

C. A judge shall not belong to any organization, other than a religious organization, which practices invidious discrimination on the basis of race, sex, religion, or national origin.

COLLATERAL REFERENCES

A.L.R. — Consorting with, or maintaining social relations with, criminal figure as ground for disciplinary action against judge, 15 A.L.R.5th 923.

CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF THE OFFICE IMPARTIALLY AND DILIGENTLY.

A. **Judicial Duties in General.** The judicial duties of a full-time judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply.

B. **Adjudicative Responsibilities.**

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or permitted by rule, or transfer to another court occurs.

(2) A judge shall apply the law and maintain professional competence. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge should maintain order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, and others subject to judicial direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and should not permit, and shall use all reasonable efforts to deter, staff, court officials and others subject to judicial direction and control from doing so. A judge should be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge should require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Canon does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law. Except as authorized by law, a judge shall neither initiate nor consider, and shall discourage, ex parte or other communications concerning a pending or impending proceeding. A judge may consult with the court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges provided that the judge does not abrogate the responsibility to personally decide the case pending before the court. No communication respecting a pending or impending proceeding shall occur between the trial judge and an appellate court unless a copy of any written communication or the substance of any oral communication is provided to all parties. A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the court if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. A judge may, with the consent of the parties either in writing or on the record, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. A judge should require similar abstention on the part of court personnel subject to judicial direction and control. This Canon does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court. This Canon does not apply to proceedings in which a judge is a litigant in a personal capacity.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for purposes unrelated to judicial duties, information acquired in a judicial capacity that is not available to the public.

(12) A judge should prohibit broadcasting, televising, or recording in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration; or

(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

(13) A judge should prohibit taking photographs (including motion picture and videotape) in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that still photographs of the judge and other court personnel, counsel, spectators, parties and witnesses are permissible, subject to restrictions specified by the court and subject, in the case of parties and witnesses, to their advance consent in writing, provided that the court shall specifically forbid the taking of any photographs where it finds a substantial likelihood that such activity would jeopardize a fair hearing or trial in the matter at issue.

C. **Administrative Responsibilities.**

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration, and cooperate with other judges and court officials in the administration of court business.

(2) A judge should require staff, court officials and others subject to judicial direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments, shall exercise the power of appointment impartially and on the basis of merit, and shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

D. **Disciplinary Responsibilities.** A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware. This section does not apply to information generated and communicated under the policies of the Judicial Performance Evaluation Program.

E. **Disqualification.**

(1) A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge had served as a lawyer in the matter in controversy, had practiced law with a lawyer who had served in the matter at the time of their association, or the judge or such lawyer has been a material witness concerning it;

(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has

an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and should make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

F. **Remittal of Disqualification.** A judge disqualified by the terms of Canon 3E may disclose the basis of the judge's disqualification and ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge need not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be entered on the record, or if written, filed in the case file.

NOTES TO DECISIONS

Interest substantially affected.

Under Subdivision (E)(1)(d)(iii) of this canon, a relative of the requisite degree of relationship has an "interest" that might be sufficiently "affected by the outcome" of a case whenever a judge sits on a case in which the judge's relative is a partner or otherwise an equity participant in a firm that represents a party to the case. Regional Sales Agency, Inc. v. Reichert, 830 P.2d 252 (Utah 1992).

COLLATERAL REFERENCES

Brigham Young Law Review. — Note, Maintaining Public Confidence in the Integrity of the Judiciary: *State Bar of Nevada v. Claiborne*, 1989 B.Y.U. L. Rev. 283.

A.L.R. — Disqualification from criminal proceedings of trial judge who earlier presided over disposition of case of coparticipant, 72 A.L.R.4th 651.

Abuse or misuse of contempt power as ground for removal or discipline of judge, 76 A.L.R.4th 982.

Disciplinary action against judge for engaging in ex parte communication with attorney, party, or witness, 82 A.L.R.4th 567.

Judge's previous legal association with attorney connected to current case as warranting disqualification, 85 A.L.R.4th 700.

Removal or discipline of state judge for neglect of, or failure to perform, judicial duties, 87 A.L.R.4th 727.

Disciplinary action against judge on ground of abusive or intemperate language or conduct toward attorneys, court personnel, or parties to or witnesses in actions, and the like, 89 A.L.R.4th 278.

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * *

PAUL GARDNER, NUF CORPORATION, a Utah corporation, Plaintiffs, v. KENNETH MADSEN, et al., Defendants.	Case No. 930906772 CN Transcript of: JUDGE'S BENCH RULING after Trial Proceedings

* * *

BEFORE THE HONORABLE JUDGE HOMER F. WILKINSON

Salt Lake City, Utah

Tuesday, October 24, 1995

APPEARANCES

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APPENDIX C

TUESDAY, OCTOBER 24, 1995; A.M. SESSION

JUDGE'S BENCH RULING

THE COURT: Counsel, I am going to give you my decision. Some of the things -- I have to leave some accounting to the two of you to work out. I haven't put a pencil to all these. But with the way the Court is ruling, I don't think there will be any problem.

First of all, let me indicate to you that I think the toughest question in this case is the question of the standing of the corporation, the right to sue. And I don't know what may take place. I'll say right now that the way I am looking at it, I don't think that either party has given the Court sufficient law for the Court to make -- well, for the Court to be certain as to the position or what the law is as far as the situation of this type is concerned.

I think each of you have stated your understanding, and quoted statutes which I don't deny as far as a corporation is concerned, a right to sue and a right to be sued. I think that the defendant is right when they argue that a corporation not in good standing doesn't have the right to sue. I'm not persuaded that going out and renewing that corporation gives that corporation a right to sue. I may be wrong in that, but that's the position that I look at it.

The Court was asked here today and was listening to see what the evidence was going to be as far as any type of assignment or a winding up and dissolution of the corporation where the stockholders were given the right to collect the debts of the corporation. I heard very sparse testimony on the assignment. I was waiting for more. It didn't come in. I was waiting for some strong objection to it and it didn't come in.

So this Court, the only evidence this Court can assume is there was some type of assignment given to Mr. Gardner, of which he testified, to bring the action. That if the assignment was there, I think he has the right to bring the action in his name. And of course it's filed in the name of the corporation, too, a d/b/a. I don't know that a d/b/a was proper in this situation.

I also am persuaded somewhat that the whole situation was dealt with by Mr. Gardner -- the defendant dealt with Mr. Gardner as him being Mr. Gardner, although he did know that the NUF Corporation did sign in that way. Of course he says the only reason it was was to keep the knowledge away from his wife. Well, if that was the reason for it, that's not a sufficient reason to hide behind the corporate veil. And in all probability the individual, Mr. Gardner, would have been responsible in the situation.

So this Court is going to deny the defendant's

motion to dismiss or summary judgment as far as the corporate situation is concerned. Although I readily state to you, as I already have, that it's vague in the Court's mind and there is no absolute law given to the Court to base its decision on.

Now, the next situation is, these parties entered into a contract on June 15th, 1990, and the Court is going to enforce the terms of that contract. I have never seen a case that so many different, it seemed like, contracts are floating around. But I guess she's the defendant, the defendant Marilyn Madsen took the witness stand and said she drafted the contract and she drafted five copies of it. So I guess that's the reason that they are floating around. And if she made five copies, that was not good because everybody got a different copy possibly of what the final contract was.

The one contract, Exhibit 2, does not have the word "summer" written into it. Exhibit 46 does have the word "summer" written into it. Exhibit 2 does not have the addition which was made later as far as the wave runners being made a part of the contract. Exhibit 46 does have that included in it. That leads me to believe that Exhibit 2 in all probability was the contract of which the parties were using, because they certainly pulled it out and wrote at a later date the new material on it.

MR. SUMMERHAYS: Your Honor, I'm sorry. I believe

there is a misspeaking there. You said Exhibit 2 did have the wave runner, 46 did not.

THE COURT: I'm sorry. 46 has the wave runner, Exhibit 2 does not.

MR. CRIST: You said it right, your Honor.

THE COURT: Well, anyway, that's the way it is. 46 has the wave runner on it and 2 does not.

The thing that convinces the Court to rule this way is that when Mr. Throckmorton took the stand, he said there were two and possibly three pens used. And he said that the "6" was crossed over and the "5" was probably crossed over with two different pens and "summer" was written in with a different pen.

Well, that leads me to believe that the parties were doing some negotiating. And that on one of them it was written over at that time, the "6" was written over. And could you see? Even I could tell it had been written over again. And with that being written over, I think that the parties were adding or making changes to that part.

It appears that the "summer" then was written in with the same pen and the "PG" was written on with the same pen at the time that was done. And they got it done in one contract and didn't complete it on the other contract. I don't know that, but that's the way the Court is ruling. I am ruling that "summer" was part of the contract.

I am also ruling that the plaintiff had the responsibility under the contract under subsection or paragraph 3 to pay $100 a month to cover the 20 percent cost of maintaining the insurance and the buoy fees. I am also ruling that the plaintiff agreed to reimburse sellers for 20 percent of out-of-pocket expenses reasonably incurred in keeping the property and equipment in good working order or to repair any damages. That's in paragraph 4. I am also ruling in paragraph 9 that the purchaser agreed to pay $100 a week towards reserve -- or $100 a year towards reserve for maintenance, and agrees to pay 20 percent of all maintenance costs which may exceed any amount that is built up in the reserve.

Or in other words, I am saying that this is a valid contract and I am enforcing it.

MR. SUMMERHAYS: Your Honor, may I ask you a question about the reserve?

THE COURT: Yes.

MR. SUMMERHAYS: Is the reserve the $1200, any of the $1200 -- the $100 a month that isn't spent for buoy and insurance, or is it something else?

THE COURT: No. The reserve, it says, is $100 a year.

MR. SUMMERHAYS: $100 a year.

THE COURT: $100 a year towards the reserve for

maintenance, and agrees to pay 20 percent of all maintenance costs which may exceed that reserve. And I would say, exceed the reserve in any particular year.

MR. SUMMERHAYS: Yeah.

THE COURT: I am also of the opinion, and I so rule, that the Rules and Regulations were attached to the contract. But even if they were not attached to the contract, it makes no difference to this Court because it does say specifically in here a number of times that he is bound by the Rules and Regulations. And if he didn't know what they were, he should have found out what they were. And it was his responsibility, speaking of the buyer, and that he is bound by the terms of the Rules and the Regulations regardless of when he got them.

I am also of the opinion and so rule that the Rules and Regulations were violated by the purchaser, the buyer. But the only one that is really -- the evidence is clear that the Court can find that what was violated was No. 10, and that's where no pets were allowed on it. And that that is not sufficient to forfeit the contract. And that even if others were violated, such as 8, it says, "possible termination of Agreement for noncompliance."

And No. 13, it of course is the worst one -- when I say the "worst" one, that could happen to the boat -- and that's of course an act of negligence where they allow the

destruction of the boat, and not putting the buoy up properly, and the boat sinking, or burning up the engine and running it without oil.

Neither of those took place. There have been no allegations of negligence whatsoever in this case. There may have been some fault, there may have been some damage. But there has been no allegation of negligence. There has been no proving. When I say "no allegation," maybe the parties have in a sense alleged negligence but they certainly haven't proven or shown negligence on any particular party as far as the damage to the boat. Therefore, the contract is not subject to forfeiture.

And as I say, even though it were, as counsel well knows in all types of contracts, just the fact that it says "forfeiture," it may be too harsh and the Court does not always enforce that type of remedy anyway. Of course I don't have to face that here.

I am also of the opinion that there is some negotiation between the buyer and the seller. This got involved -- and this is not clear here, and I am speaking about the seventh week -- maybe my notes may be more complete. But that on the contract, the seller did make a notation on the contract that because of the fact that the ski boat -- and I can't read this clear -- was not being provided, the additional week was given. I am of the opinion

that that was for that one year and it was not a permanent situation because that's when they were negotiating as far as the particular situation is concerned.

Now, this Court also has to look somewhat at the credibility of the witnesses here. And I think basically everybody who has testified in this case has been honest. I think the memories have faulted. That sometimes when you live with something so long, and even though it wasn't true originally, you convince yourself that it's the truth.

And I don't know why this case was not brought before this Court a year and a half ago to be disposed of. Because that's what should have been done instead of allowing it to run on like this and the damages to continue to incur. There is no need for it. Anyway, that's where we are now. As I say, even the evidence becomes more forgetful as far as the parties are concerned.

Now, I was concerned when the defendant took the witness stand. And of course he said that the purchase price was reduced from $10,000 [sic] -- from $12,500 to $10,000, and that's why paragraph 2 was struck out, and that the ski boat and the wet bike were not included. And that made sense, because you have Option 1 and Option 2. Then he took the witness stand and testified later also that of course they were included in it, and changed his testimony on that when he was confronted on cross examination.

I was concerned when the defendant on the witness stand also testified that the wave runners had not been paid for. And counsel talked to him. And sure, I let counsel talk to his witness and refresh his memory, and that's fine. But he was quite adamant that they had not been paid for prior to the counsel talking to him on the situation. So that led me to believe somewhat that the testimony of the defendant was maybe a little more forgetful or a little more needing to make himself whole in this situation.

The Court would find that the defendant was *selling this because it was a hardship on him, and he didn't* want to sell it. And he was going to have to sell others in order to survive on it or to be able to maintain a reasonable living. And that's fine. That's why he was doing it and that's why he was looking for additional funds to come in. And there is nothing wrong with that. And he was also looking for any person responsible to pay the expenses.

Now, I am looking at Plaintiff's Exhibit 12 and Defendant's Exhibit 7. Here's where I am expecting counsel to do the accounting. I think the plaintiff is responsible for the buoy fee. Now, there is testimony here of three years and six years. I guess it's really been about five years and a few months.

And I don't know where you are going as far as I notice that the Nauti Lady as a limited partnership is a

party defendant. So I guess that this is binding on them -- well, it is binding on them. I am not guessing it, it is binding on them.

But when I say the "buoy fee," when I say for three years, I am talking about a responsibility between the plaintiff and the defendant Madsen in this case.

MR. SUMMERHAYS: Your Honor, can we run that from June 15th, 1990 to what date? Just so we can put those in there.

THE COURT: It would be June 15th of '93.

MR. SUMMERHAYS: So that would be three years.

THE COURT: Yes. That's what I am saying. I am not saying he is not responsible -- well, he is responsible for up to date. But as far as this -- well, this gentleman, he still I guess is the major owner of it. I would find that the plaintiff is not bound by anything of the limited partnership or any bylaws of the limited partnership. That his dealings were with Mr. Madsen and only dealing with Mr. Madsen, and that he would be responsible for the buoy fee up to today's date.

He would also be responsible for the general maintenance at $100 a year up to today's date.

And he would be responsible for 20 percent of all maintenance fees which exceeds the maintenance fee, when it exceeded it. In other words, when the lower unit, the drive

units, had to be repaired, that was, as I recall, '91, then of course that's the time you are looking at the 20 percent coming into play.

MR. SUMMERHAYS: That's above the $100 a year?

THE COURT: That's right.

MR. SUMMERHAYS: Yeah.

THE COURT: And the Court is going to find that the damages alleged in paragraph 5 and paragraph 6 are to be shared between the plaintiff Gardner and the defendant Madsen on an 80/20 percent basis. That the evidence is not clear that any one particular party damaged the boat either negligently or otherwise, and that each party is to pay their percentage share. And that that would also include 7 as far as the property replacement.

But the plaintiff is responsible for the refrigerator damage. That looking at the accounting, the Court would give the plaintiff credit as an offset for the items on the accounting on P-12 against this responsibility as the buoy fee, the general maintenance and the 20 percent maintenance. But that does not -- well, it would include on the Devot or the slide winch. The parties are first to adjust that out between the two of them as to what the responsibilities to each were. And then for the overpayment by the plaintiff, you would receive credit or an offset on the maintenance.

MR. SUMMERHAYS: I didn't understand that, your Honor. I'm sorry.

MR. CRIST: I don't either.

MR. SUMMERHAYS: Was that 80/20 on the slide or Devot or plaintiff was paying for it?

THE COURT: No, no. 80/20 on the slide and Devot. Any amount paid over 20 percent, he would receive an offset on the others.

MR. SUMMERHAYS: For maintenance.

THE COURT: Of course the wave runner, naturally that's not included here nor is the purchase price.

MR. SUMMERHAYS: No. When you say the wave runner is not included, your Honor, are you finding that he didn't sell the wave runner?

THE COURT: Oh, yes.

MR. SUMMERHAYS: He did sell the wave runner.

THE COURT: Yes. My understanding on the wave runner, that that took care of itself, didn't it?

MR. SUMMERHAYS: Yeah. That was a separate deal -- oh, no.

MR. CRIST: There were separate damages for the wave runners.

MR. SUMMERHAYS: We paid $4500. He never got any wave runners.

MR. KENNETH MADSEN: That's not true, your Honor.

MR. SUMMERHAYS: That was my client's testimony, your Honor. You need to make a finding on that.

MR. CRIST: What is it you are saying? He had the use of them. He testified that he put them in storage and signed that stuff.

THE COURT: My recollection of the testimony, the wave runners were purchased, he paid the $4500 on them.

I am just looking at the contract here.

And that he paid $4500 and that was 50 percent and he owns 50 percent of the three wave runners. And that takes care of itself. That's why he would not receive any credit off of here. Just the same as the purchase price, he would not receive any purchase price.

MR. SUMMERHAYS: On that $4500?

THE COURT: That's right.

The Court would also find that the contract is in force and the plaintiff was entitled to six weeks each year since its inception, except for the one year and that was seven weeks, although I am eliminating that seventh week because I think that the period that the boat was down, it was into a period and part of what they say is the prime summertime, May through October. And I think that he has some responsibility on that. And so I am saying that it is six weeks, summer weeks, since the contract was entered into.

I am not persuaded that the testimony was clear at

$3500. In fact, I thought the testimony was very sparse as far as what the value of the week was. The best testimony that the Court has is $1800 a week.

MR. SUMMERHAYS: May I ask about the week calculation, your Honor? Would that be six weeks for '90, '91, '92, '93, '94 and '95?

THE COURT: Yes.

MR. SUMMERHAYS: So that would be 36.

THE COURT: Well, no, let's see. I am not going to give six weeks in '90, not in '90, not summertime weeks in '90 because they were entered into June 15th. That's a month and a half. I am going to say -- that's the middle of the month -- I am giving three weeks for '90 and six weeks for each year thereafter.

MR. SUMMERHAYS: Is that less the -- how many usage weeks did you find that he used?

THE COURT: The testimony was that he had six weeks of use. Less the six weeks.

MR. SUMMERHAYS: Okay.

THE COURT: Any questions?

MR. SUMMERHAYS: No.

Your Honor, the attorney's fees issues.

MR. CRIST: I don't understand this. Are you saying that he was denied six weeks or he got the six weeks?

THE COURT: He used the boat six weeks since he has

been in the contract. And that is taken away from any damages that he is entitled to. I am saying that he is entitled to three weeks for '90, six weeks for '91, '92, '93, '94 and '95, less six weeks that he had the use of the boat.

MR. CRIST: You are finding he only had use of the boat six weeks total?

THE COURT: I believe that's what the testimony was.

MR. CRIST: It's not even close, your Honor. It's going to be appealed anyway.

THE COURT: If you can point me out where that is wrong.

MR. CRIST: He testified himself that he used it 11 weeks.

MR. SUMMERHAYS: He said six, your Honor.

THE COURT: If I'm wrong on that, counsel -- my notes as I read them were six weeks, and that's my memory. If I am wrong on that, then of course you'll have to look at the record.

MR. SUMMERHAYS: We'll check the record, your Honor. And I think counsel and I can work that out.

THE COURT: Any other questions?

MR. SUMMERHAYS: Attorney's fees, your Honor.

THE COURT: The contract does provide for attorney fees. I have not seen the Affidavit which has been

submitted. I am going to allow reasonable attorney fees.

I probably will be somewhat skeptical -- or "critical," I should use the term -- of the attorney fees because I am of the opinion there was no reason for this case to go on the length of time that it has. Of course I will not allow any attorney fees naturally for Judge Frederick's case.

MR. SUMMERHAYS: We didn't submit any.

THE COURT: So I will have to look at the Affidavit, which I haven't had an opportunity to, and give you a call, counsel. Or you may call me if I don't get back to you and let you know on the attorney fees.

MR. SUMMERHAYS: Your Honor, when I say I didn't submit any on Judge Frederick's, that's what I was told by my people, and I hope that is what it is. But we agree we shouldn't get any attorney fees on any part of that.

THE COURT: Mr. Summerhays, I ask you to prepare the pleadings.

MR. SUMMERHAYS: I will do so, your Honor.

THE COURT: Court will be in recess.

MR. SUMMERHAYS: Thank you, your Honor.

(This concludes these proceedings at 1:07 p.m.)

* * *

C E R T I F I C A T E

STATE OF UTAH)
:
COUNTY OF SALT LAKE)

I, SUZANNE WARNICK, RMR, CSR, do certify that I am a nationally certified Registered Merit Reporter, a state Certified Shorthand Reporter, and a Notary Public in and for the State of Utah.

That at the time and place of the proceedings in the foregoing matter, I appeared as the court reporter in the Third Judicial District Court for the Honorable Judge Homer F. Wilkinson, and thereat reported in stenotype all of the proceedings had therein.

That thereafter, my said shorthand notes of the Judge's Bench Ruling were transcribed by computer into the foregoing pages; and that this constitutes a full, true and correct transcript of the same.

WITNESS MY HAND AND SEAL in Salt Lake City, Utah on this, the 6th day of November 1995.

Suzanne Warnick, RMR, CSR

NOTARY PUBLIC
SUZANNE WARNICK
770 East 2000 South
Bountiful, Utah 84010
My Commission Expires 4/1/99
STATE OF UTAH

My commission expires:
1 April 1999

EXHIBIT B

AGREEMENT

This Agreement entered into this 15 day of June 1989, by and between KEN MADSEN and MARILYN MADSEN, husband and wife, of 4807 Yorktown Drive, Salt Lake City, Utah 84117, hereinafter referred to as "SELLERS" and NWF Inc a Utah Corp., ~~husband and wife~~, of Salt Lake, Utah, hereinafter referred to as "BUYERS";

In consideration of their mutual promises, the parties agree as follows:

OPTION NO. 1:

1. SELLERS agree to sell and BUYERS agree to purchase a ten percent (10%) interest in the following described property:

   62 foot Summerset Cruiser houseboat including the accessories thereon, a Jet Ski Boat and a Wet Bike.

2. ~~BUYERS agree to pay to SELLERS the total purchase price of TWELVE THOUSAND DOLLARS FIVE HUNDRED DOLLARS ($12,500) for the above described property.~~

OPTION NO. 2:

Same as above excluding Ski Boat and Wet Bike. BUYERS agree to pay to SELLERS for ten percent (10%) interest in the 62 foot Summer Cruiser houseboat TEN THOUSAND DOLLARS ($10,000).

3. BUYERS agree to pay an additional ONE HUNDRED DOLLARS ($100.00) per month to cover twenty ~~five~~ (20%) percent of the costs to maintain insurance and buoy fees and other miscellaneous costs incurred to maintain the property. (insurance and storage fees for ski boat and wet bike have not yet been determined).

Ck. 7507
1/13/98 2508 must be $1,600

1 Jan Feb 20-1993.

4. BUYERS further agree to reimburse SELLERS for twenty~~-five~~ (20%) percent of any out-of-pocket expenses reasonably incurred to keep the property and equipment thereon in good working order or to repair any damages or equipment failures NOT INCURRED BY ANY ONE PARTY. (Refer to Boat Rules and Regulation).

5. BUYERS will be entitled to the exclusive use and possession of the above described property for a total of 6 (M. P.) Summer weeks each calendar year. (refer to Boat Rules and Regulations, Item # 1 for additional use of unscheduled time). SELLER would then have the right of exclusive use and possession of the property for the remaining weeks of each calendar year. Time Schedule for 1990 will be negotiated between BUYERS and SELLERS at the time of signing this Agreement. Future Time Schedules will be set up at the beginning of each Calendar Year.

6. SELLERS specifically warrant and guarantee that they are the owners of the above described property and have the right to sell and convey the same and that there are no liens or encumbrances on said property.

7. The parties specifically acknowledge and agree that said property described above is being sold "as is" and that, except for the warranties of title, SELLERS make no further warranties as to the condition of said described property. BUYERS specifically acknowledge that they have inspected the property and takes the same in its present condition and upon their own evaluation and judgment and without reliance upon representations of the SELLERS.

8. SELLERS agree to continue to maintain collision and liability insurance on said property.

9. In addition to the purchase price and the aforementioned expenses, each BUYER agrees to pay $100 per year towards a reserve for maintenance and agrees to pay 20 % of all maintenance costs which may exceed the reserve.

10. BUYER agrees to be bound by the attached Rules & Regulations, the attached usage schedule and specifically for forfeiture provisions contained in the Rules & Regulations which provide the circumstances under which a BUYER will forfeit his entire interest in the cruiser.

11. The parties agree that should BUYER desire to sell his interest in the Cruiser, the decision as to the sale can only be made upon agreement between SELLER and BUYER. Should SELLER and BUYER determine to sell the cruiser, it will be sold and the proceeds therefrom, after paying all sales expenses and etc. shall be divided according to the percent owned.

12. The SELLER and BUYER agrees that any decision as to trading the Cruiser in on a successor cruiser will only be made by unanimous decision of SELLER and BUYER.

13. The Cruiser (Nauti Lady) will remain harbored at Hite Marina, Lake Powell, UT.

14. It is the intent of the SELLER to retain controlling interest of 55% of the Cruiser.

15. The Undersigned does hereby purchase ten percent (10%) of said Cruiser and other described property. In the event of any default under this Agreement, the defaulting party agrees to pay reasonable attorney's fees and costs of the prevailing party.

DATED this 15 day of June 1990.

KENNETH D. MADSEN "Seller"

MARILYN K. MADSEN "Seller"

NUF Inc by "Buyer"

"Buyer"

I Kenneth D. Madsen Sell 50% Ownership in Three Ware Runners. Inc free and c of Any liens also Title will be Reg Kenneth madsen & NUF Inc.